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No. 94-2061

Supreme Court, U.S.
FILED
AUG 21 1995
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

GARY W. JENKINS,
Petitioner,

V.

AMCHEM PRODUCTS, INC.;
UNION CARBIDE AGRICULTURAL PRODUCTS CO.;
RHONE POULENC AG. COMPANY;
PLATTE CHEMICAL CO.;
and
FARMLAND INDUSTRIES, INC.,
Respondents.

REPLY BRIEF FOR PETITIONER

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Other Sources

F. Frankfurter, The Commerce Clause Under Marshall, Taney and Waite, 75 (1937) 3,4

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REPLY BRIEF FOR PETITIONER

I. RESPONDENTS FAIL TO ADDRESS THE SIGNIFICANCE OF THE *MYRICK* DECISION

The brief in opposition proceeds as if *Cippolone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S.Ct. 2608, 120 L. Ed. 2d 407 (1992) is the last word from this Court regarding preemption of state tort claims. Petitioner submits that *Freightliner Corp. v. Myrick*, 514 U.S. ___, 115 S. Ct. 1483, 131 L. Ed. 2d 385 (1995) is a significant preemption decision that applies in the context of FIFRA preemption. *Myrick* is made even more important by the respondents' failure to cite anything from the record which would cast doubt on the simple truth that there is no federal standard regarding 2,4-D's propensity for causing cancer. Therefore, *Myrick's* holding - that if there is no federal standard for a private party to comply with, the states can impose their own safety standards - should apply with equal force in this case. Respondents never address the significance of *Myrick*.

II. RESPONDENTS' RELIANCE UPON DICTA FROM *MORTIER*, IS MISPLACED

Respondents seize upon dicta from *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 111 S.Ct. 2476, 115 L.Ed. 2d 532 (1991) to imply that the preemptive scope of FIFRA §136v(b), when read in conjunction with the savings clause of FIFRA §136v(a), already has been decided by this court. (Resp. Br. in Opp, at p. 6). Petitioner submits that *Mortier* did not address the preemptive scope of FIFRA in the context presented in this case (involving a state law products liability claim). Indeed, it is significant that the Court in *Mortier* held that FIFRA does not "occupy the field" of pesticide regulation. *See* 111 S. Ct. at 2486. The fact that there is no federal occupation of the field of pesticide regulation is self-evident, unless Congress was so presumptuous as

to believe the EPA could humanly devise a perfect regulatory scheme and that the pesticide industry would, henceforth, label and warn sufficiently to prevent injury. It is far more reasonable to find that Congress intended for state law to provide a remedy when the federal regulatory scheme regarding warnings and labeling failed. *See Silkwood* v. Kerr-McGee Corp., 464 U.S. 238, 263-264 (1984) (Blackmun, J. dissenting). In order to reach a contrary conclusion, one must embrace the proposition that Congress *intended* to leave individuals injured because of a failure to warn *without a remedy.* The impropriety of this proposition, either as a matter of statutory construction, or in the context of a due process inquiry, is not mitigated by the mere possibility of other avenues of recovery. A benign judicial acceptance of such an insidious construct will lead to even more legislation designed to foreclose victims of wrongdoing from pursuing theories of recovery for normative wrongs upon which the proof may warrant a recovery.

III. THE PETITION FOR A WRIT OF CERTIORARI RAISES AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, RESOLVED BY THIS COURT

Supreme Court Rule 10.1(a) provides for discretionary review of a decision of a state court that has decided an important question of federal law that has not been, but should be, resolved by this Court. As pointed out in the petition, members of this Court have recognized the importance of the due process question left unanswered in footnote 32 of *Duke Power* v. *Carolina Envtl. Study Group, Inc.*, 489 U.S. 189 (1978). *See Fein v. Permanente*, 474 U.S. 892 (1985) (White, J., dissenting); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 93-94 (1980) (Marshall, J., concurring).

Here, the treatment of the *Duke Power* case by the Kansas Supreme Court literally begs for review by this court. The Kansas Supreme Court noted that under the Kansas Constitution, a quid pro quo is required upon modification of rights protected by the Kansas Constitution. *Jenkins v. Amchem Products, Inc.*, 256 Kan 602, 886

P.2d 869, 885 (1994), app. p. B30-31. The Kansas Court then states: "Both of these Kansas cases involved rights arising out of the Kansas Constitution rather than the United States Constitution." *id.* 886 P2d. at 885, app. p. B31.

The Kansas Supreme Court read *Duke Power* as an affirmative statement that, under the Constitution, Congress need not provide an alternative remedy when it significantly modifies a common law right. *Id.* 886 P.2d at 885-886, app. p. B31-32. That court stated that "Plaintiff's state law claim does not constitute a liberty interest or fundamental right deserving of heightened scrutiny" and applied a "rational basis" test to the challenged statute.[1] *Id.* Herein lies the conceptual dilemma posed by the Kansas Supreme Court's decision. Plaintiff's claim is fundamental under Kansas law, requiring a quid pro quo if modified by the Kansas legislature, yet Congress, in its exercise of the Commerce Clause power can, upon a finding of mere rationality, destroy a fundamental right? The Kansas Court's decision ignores the fact that Commerce Clause power was not intended to interfere with the State's traditional sovereign role of adjusting disputes between private parties. *See United States v. Lopez*, 514 U.S. ___, 115 S.Ct. 1624, 1642 (1995) (Thomas, J., concurring)[2]

That a Supreme Court of one of the fifty states could state that Petitioner's rights, under these facts, "arise[ ] out of the Kansas

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[1] Petitioner did not in the Court below, and does not here, raise an equal protection challenge to the statute.

[2] Petitioner concedes Congress has the power to regulate the substance of pesticide labels. Petitioner does not concede that in the mere administrative exercise of that power, that the Commerce Clause allows Congress to divest the States of the exercise of their sovereign power to adjust disputes, unless Congress were to provide a mechanism for an alternative remedy. This is essentially a question of categorization. Congress, in setting standards for pesticide labels, does exercise a valid Commerce Clause power. Congress, in preventing the States from administering justice, without providing an alternative remedy, is not regulating commerce. It is regulating the administration of justice.

Constitution rather than the United States Constitution" is evidence of the conceptual disarray extant in the republic today concerning the formal sources of limitation upon Congressional power represented by the Commerce Clause and the Due Process Clause, and the different policies each clause is designed to vindicate. See, F. Frankfurter, The Commerce Clause Under Marshall, Taney and Waite, 75 (1937). Petitioner submits, with all due respect, that this disarray is a result, in no small part, of decisions by this court which imply that it is only the Bill of Rights, or positive state law, which creates the liberty which the Due Process Clause protects. *See Leis v. Flynt,* 439 U.S. 438, 456, n.29, 99 S.Ct. 698, 58 L.Ed. 2d 717 (1979). (Stevens, J., dissenting).

CONCLUSION

The Petition should be granted. The record in this case presents a clean canvas upon which this court can address, in a manner understandable to both law professors and the citizens of this country (1) the role fundamental questions of federalism should play in statutory construction, and if the Court finds that Congress intended to preempt the state law claims at issue, (2) the extent to which Congress' Commerce Clause power is limited by the Due Process Clause.

A failure by this Court to squarely address the issues presented by this Petition will result in the continued federalization of tort law, either through Congressional legislation or the erroneous invocation of preemption doctrine. The current course, if uncorrected, will soon lead to the day when the United States Supreme Court is the court of last resort on a plethora of garden variety tort cases, a result neither contemplated nor capable of being judiciously managed, by Article III of the Constitution.

ERRATA

Petitioner informs the Court that in his initial Petition for a Writ of Certiorari, the citation to the appendix in footnote 10, at page 21, is incorrect. The correct attribution for the quotation within footnote 10 is: app. p. C12.

Respectfully Submitted,
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